SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-832

LE CONTÉ COSMETICS, INC., and ELTON C. TOLAND,

Petitioners,

vs.

THE J. B. WILLIAMS COMPANY, INC.,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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Petitioners,

vs.

THE J. B. WILLIAMS COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, Le Conté Cosmetics, Inc. and Elton C. Toland (hereinafter usually collectively referred to as "LE CONTÉ COSMETICS") pray that writ of certiorari issue to review two related decisions of the U.S. Court of Appeals for the Ninth Circuit dated June 2, 1975 and September 18, 1975, reversing a judgment dated May 17, 1973 of the U.S. District Court for the Central District of California.

Opinions Below.

The District Court made its only opinion after trial on May 17, 1973 reported at 178 USPQ 442 [copy attached and called Appendix A]. A first opinion of the Appellate Court dated June 2, 1975 is reported at 178 USPQ 442 [copy attached and called Appendix B]. A second or revised opinion of the Appellate Court dated September 18, 1975 is not yet reported [copy attached and called Appendix D]. An order

of the Appellate Court denying Defendants-Appellees' Petition for Rehearing is not reported [copy attached and called Appendix E].

Jurisdiction.

The judgment of the Appellate Court was entered on June 2, 1975 [App. B], a timely petition for rehearing was filed [App. C] and it was denied on September 18, 1975 [App. E]. A revised or second opinion by the Appellate Court was filed September 18, 1975 [App. D].

On November 28, 1975 the Defendants-Appellees moved the Appellate Court to recall and stay its mandate so this petition for a writ of certiorari could be filed.

Jurisdiction of the Supreme Court to review the two decisions or at least the last decision of the Appellate Court is invoked under 28 USC 1254(1).

Questions Presented.

1. Is the test for determining likelihood of confusion under the Federal trademark and unfair competition laws based upon reasonable and prudent purchasers—or—upon ignorant, inexperienced and gullible purchasers?

2. Should a newcomer in a highly competitive industry be required to take reasonable precautions to avoid confusion—or—to insure against the possibility of confusion?

U.S. Statute Involved.

Title 15 Section 1114(1) of the U.S. Code provides in pertinent part as follows:

Any person who shall, without the consent of the registrant—

(a) use in commerce any reproduction, counterfeit, copy or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is *likely to cause confusion, or to cause mistake, or to deceive; or*

(b) reproduce, counterfeit, copy or colorably imitate a registered mark and apply such reproduction, counterfeit, copy or colorable imitation to labels, signs, prints, packages, wrappers, receptacles or advertisements intended to be used in commerce upon or in connection with the sale, offering for sale, distribution, or advertising of goods or services on or in connection with such use is *likely to cause confusion, or to cause mistake, or to deceive;* shall be liable in a civil action by the registrant for the remedies hereinafter provided (emphasis added).

Statement of the Case.

J. B. Williams is a well known manufacturer of pharmaceuticals and toiletries, some of which have national recognition, *e.g.*, GERITOL and AQUA-VELVA.

One of its lines of toiletry products has been marketed for over 50 years under the single word brand CONTI which is protected by four U.S. trademark registrations. CONTI products are specialty items featuring castile properties and are formulated to be gentle and mild. The advertising and labeling for CONTI are designed to appeal to consumers with a special need or desire for gentle and mild soap or shampoo.

Le Conté Cosmetics, Inc. is a manufacturer of cosmetics and toiletries and since 1966 has marketed these products on a nationwide basis under the two

words and brand name LE CONTÉ. The brand name LE CONTÉ bears an emphasis mark over the second "E" in order to create a French appearance and pronunciation.

LE CONTÉ products are specialty items featuring a hormone composition and the packaging and labeling for LE CONTÉ products stress the specialty hormone nature. The principal trademark employed by Le Conté Cosmetics which appears on virtually all packaging and advertising consists of the brand name LE CONTÉ surrounded by a musical clef symbol.

Sales and promotional efforts by Le Conté Cosmetics, a completely Black-owned and operated company, have concentrated in areas of high Black population such as the Watts region of Los Angeles and the Deep South. LE CONTÉ customers are consequently predominantly Black.

CONTI products are all distinctively packaged in the colors green and white and LE CONTÉ products are all packaged in the distinctive colors of pink, gold and white. CONTI, as it appears on packaging, is visible from a great distance whereas the name LE CONTÉ cannot be read on its packaging at very close range.

The complaint by J. B. Williams stated two interrelated claims for trademark infringement and unfair competition. J.B. Williams' answers to interrogatories disclosed that it had no evidence of any instances of actual confusion.

The parties filed reciprocal motions for summary judgment and the District Court noted that there were several disputed issues of material fact. The parties agreed to withdraw their reciprocal motions for summary judgment and have an abbreviated trial based upon some stipulated facts and the fact-findings of the District Court to be determined at trial.

Importantly, at trial, the parties through their counsel stipulated that the sole test to be applied was "*reasonable likelihood of confusion*" between the trademarks LE CONTÉ and CONTI and the District Court was urged to try the controversy on that basis.

The issue of reasonable likelihood of confusion between the trademarks LE CONTÉ and CONTI was resolved in favor of Le Conté Cosmetics and J. B. Williams appealed.

In reversing the District Court's judgment by its first opinion of June 2, 1975 [App. B] the Appellate Court ruled that the District Court had incorrectly applied the test to determine likelihood of confusion because "The reasonableness of the likelihood is not an issue on this appeal". In addition the Appellate Court indicated that "reasonable and prudent" customers are not to be considered. Moreover, the name CONTI was characterized by the Appellate Court as a "strong" mark just because its origin was stipulated to be unknown.

Although Le Conté Cosmetics' petition for re-hearing was denied, some of the points stressed were incor-

porated in the Appellate Court's second opinion [App. D]. The Appellate Court still maintained that the test was merely "likelihood of confusion" but as least took into consideration a "reasonable customer of average intelligence and experience" restricted to the points of similarity, *i.e.*, the "nexus of features shared by the two marks".

The net result of the Appellate Court's two decisions was to reverse the District Court's judgment that there was no "reasonable likelihood of confusion" between the trademarks CONTI and LE CONTÉ". The Appellate Court implied, however, that if a "prudent, worldly person" was considered there would be no likelihood of confusion [first opinion, App. B] and that if a "worldly and sophisticated person" was considered there would be no likelihood of confusion [second opinion, App. D]. Thus, the Appellate Court virtually agrees with the District Court that there is no "reasonable likelihood of confusion" between CONTI and LE CONTÉ but nonetheless has reversed the District Court on this critical issue.

REASONS FOR GRANTING THE WRIT.

I.

The Supreme Court Has Never Spoken on the Meaning of Likelihood of Confusion Within the Scope of the Lanham Act Which Became Law Almost 30 Years Ago—Notwithstanding the Widespread Impact of the Phrase on the Rights of Manufacturers and the General Public.

Competitors as well as the general public need to know the test under the Lanham Act for determining the issue of likelihood of confusion.

Trademarks and especially brand names vitally affect practically every citizen every day and in numerous ways. They are the psychological symbols which are exploited by their owners to draw customer attention. *Mishawaka Rubber & Woolen Mfg. Co. v. S. S. Kresge Co.*, 316 U.S. 203 (1942).

At the very heart of practically every controversy involving trademark infringement and/or unfair competition claims arising under federal law, is the pivotal issue of likelihood of confusion. It is a nebulous phrase of art subject to wide-ranging meanings.

Manufacturers, traders, businessmen etc. and especially new competitors need to know their limitations in selecting and using trademarks. Must every new trademark avoid confusion among the "ignorant, the inexperienced and the gullible"? [App. B], a class of customers far less than reasonable [App. D] or reasonable and prudent consumers [App. A]?

The already great need to know a workable definition of "likelihood of confusion" is being heightened every day due to the increasing numbers of competi-

tors and the decreasing supply of brand names available to new competitors. Millions of names have been monopolized through federal and state trademark registrations. The scarcity of available names in the highly competitive toiletries and cosmetics field is especially acute. *Clairol Inc. v. Gillette Co.*, 389 F.2d 264 (2d Cir. 1968); *Jean Patou Inc. v. Jacqueline Cochran Inc.*, 201 Supp. 861 (D.C.S.D.N.Y. 1962) aff'd 312 F.2d 125 (2d Cir. 1963), *Clairol Inc. v. Revlon, Inc.*, 144 USPQ 238 (N.Y. Sup. Ct. 1964).

Since the enactment of the Lanham Act, 15 USC 1051 *et seq.*, July 5, 1946 no opinion of the U.S. Supreme Court has provided any guidelines as to the meaning and implementation of the phrase "likely to cause confusion, or to cause mistake, or to deceive" [15 USC 1114(1)]. The statute is not self-explanatory, fails to give adequate notice and is so vague and indefinite as to cause more misunderstanding than it avoids.

With the 30th anniversary of the Lanham Act soon approaching, it is surely time for the Supreme Court to set forth definitive guidelines and this controversy is particularly suitable for review by way of a writ of certiorari.

II.

The Supreme Court Should Reaffirm the Tests Invoked Prior to the Lanham Act for Resolving Trademark Conflicts, Impliedly the Test of Reasonable Likelihood of Confusion.

Over the years prior to the Lanham Act the Supreme Court has impliedly required that the issue of likelihood of confusion should be resolved with reference to reasonable purchasers as opposed to careless purchasers.

In the last such decision dealing directly with the question *i.e., Kellogg Company v. National Biscuit Company*, 305 U.S. 111 (1938) Justice Brandeis stated:

> "The obligation resting upon Kellogg Company is not to insure that every purchaser will know it to be the maker but to use every *reasonable* means to prevent confusion". (Emphasis added).

Under these circumstances where an accused infringer ". . . has taken every *reasonable precaution* to prevent confusion or the practice of deception in the sale of its product" (emphasis added) there is no trademark infringement or unfair competition.

To resolve the central issue of likelihood of confusion with respect to purchasers who are ". . . the ignorant, the inexperienced and the gullible" [Appellate Court first opinion, App. B] or less than reasonable [Appellate Court second opinion, App. D] would be to impose onerous burdens on latecomers and require them in essence to become insurers. Under such circumstances, their property rights symbolized by various trade identities and their ability to identify themselves in crowded marketplaces would be eroded.

In the Supreme Court's often cited decision of *McLean v. Fleming*, 96 U.S. 245 (1878) the test for resolving trademark infringement charges was described as follows:

> "All that courts of justice can do, in this regard, is to say that no trader can adopt a trade-mark so resembling that of another trader, as that ordinary purchasers buying with ordinary caution, are likely to be misled".
>
> ". . . a court of equity will not interfere, when ordinary attention by the purchaser of the

> article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient to give the injured party a right to redress, if he has been guilty of no laches".

Surely the trademark laws cannot be so strict as to require the prevention of confusion as to careless people. This point has been made abundantly clear by the Supreme Court in *Coats v. Merrick Thread Co.*, 149 U.S. 562 (1893) as follows:

> "There is no doubt a general resemblance between the heads of all spools containing a black and gold label might induce a careless purchaser to accept one for the other. Defendants, however, were not bound to any such degree of care as would prevent this".

The hypothetical person who symbolizes the purchaser in deciding the likelihood of confusion issue is analogous to the familiar hypothetical reasonable man in tort law. Valuable personal and property rights would surely be destroyed if the reasonable man in torts were to become transformed and downgraded to a careless man. Similarly if the hypothetical purchaser in a trademark context is stripped of reasonableness, as the Appellate Court has indicated, latecomers such as Le Conté Cosmetics, Inc. would be deprived of valuable property and personal rights.

III.

The Supreme Court Should Resolve the Conflict Present Between the Circuits Over the Correct Test for Determining Likelihood of Confusion.

There is a division of opinion among the Courts of Appeal as to the test for determining likelihood of confusion.

The position of the Appellate Court for the Ninth Circuit as indicated by its two opinions under consideration [App. B. and App. D] is far different than the position followed by some of the other Courts of Appeal, *e.g.*, the Tenth Circuit and the Sixth Circuit. *Dawn Donut Co. Inc. v. Day*, 450 F.2d 332 (10th Cir. 1971); *West Point Mfg. Co. v. Detroit Stamping Co.*, 222 F.2d 581 (6th Cir. 1955).

In fact there is even division among the various panels within the Ninth Circuit. Some panels within the Ninth Circuit believe that the likelihood of confusion issue must be decided with reference to ignorant, inexperienced, gullible and careless purchasers, *e.g.*, *Stork Restaurant v. Sahati*, 166 F.2d 348 (9th Cir. 1948); *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149 (9th Cir. 1963) whereas some of the more recent panels of the Ninth Circuit have followed the test of reasonable likelihood of confusion, *e.g.*, *Smith v. Chanel Inc.*, 402 F.2d 562 (9th Cir. 1968); *Redken Laboratories Inc. v. Clairol Inc.*, 501 F.2d 1403 (9th Cir. 1974); *Saxony Products, Inc. v. Guerlain Inc.*, 513 F.2d 716 (1975).

With such widespread and even internal disagreement, the Supreme Court ought to intervene and shed light on this issue which is always so crucial to the outcome of trademark infringement and unfair competition controversies.

IV.

There Is No Likelihood That a Reasonable Purchaser Would Be Confused Between the Products Marked Conti and Le Conté.

At trial the parties agreed to be bound by the District Court's decision as to "reasonable likelihood of confusion".

First the Appellate Court struck down the District Court's decision because "The reasonableness of the likelihood is not an issue on this appeal" and the purchasers were thought to be ". . . the ignorant, the inexperienced, and the gullible" [App. B]. Later the Appellate Court modified its language but not the result by stating ". . . a reasonable customer of average intelligence and experience would very likely be confused as to the source, *due to the nexus of features shared by the two marks*" (emphasis added) [App. D].

The distinctions in language between the Appellate Court's first and second opinions do not amount to any real difference. The purchasers contemplated by the first and second opinions were, respectively, expressly and impliedly unreasonable.

Only an unreasonable purchaser would react to just "the nexus of features shared by the two marks". By this approach the Appellate Court is looking only to the points of similarity while disregarding all points of dissimilarity. Considering just some parts of a mark, for example, instead of the entire mark is improper as indicated by the Supreme Court in *Beckwith v. Commr. of Patents*, 252 U.S. 538 (1919) as follows:

> "The commercial impression of a trade-mark is derived from it as a whole, not from its elements

> separated and considered in detail. For this reason it should be considered in its entirety (Johnson v. Brandau, supra) and to strike out any considerable part of it, certainly any conspicuous part of it, would be to greatly effect its value".

Much to Le Conté Cosmetics' distress, the Appellate Court did in effect strike out major parts of the total Le Conté mark. The District Court found that "The name appears to have a French origin or derivation. The 'accent aigu' 'e' is distinctively French. It would normally be pronounced by an American in the French manner with the accent over the final syllable" [App. A]. While there was an abundance of evidence in the record to support the District Court's finding as to the obvious French pronunciation and appearance of LE CONTÉ, (just like JEAN NATÉ and FABERGÉ) the Appellate Court arbitrarily disagreed stating that such was "clearly erroneous".

All of the packaging for LE CONTÉ products shows the name surrounded by a striking musical clef symbol and in addition a double ring symbol. The District Court specifically found, as anyone observing the packages must, that "The LE CONTÉ name on the packages is invariably enclosed in a figure like a musical clef". Through its silence the Appellate Court arbitrarily ignored that salient feature of Le Conté Cosmetics' total composite trademark.

Other points of sharp dissimilarity disregarded by the Appellate Court and which would have been taken into consideration by any reasonable and prudent purchaser are the following:

1. CONTI is a mild and gentle product directed to all purchasers whereas LE CONTÉ is an active hormone product directed particularly to the Black population.

2. The packaging of LE CONTÉ is dressed in the flamboyant colors of pink, gold and white with distinctive container shapes—whereas the packaging for CONTI is green and white;

3. The name LE CONTÉ is printed in such small script on the packaging and is so overwhelmed by the other packaging design features that it can only be read at very close range—whereas the name CONTI in its various forms can be observed from a relatively long distance;

Under the correct test of "reasonable likelihood of confusion" which was both agreed to by the parties and actually applied by the District Court [App. A] a purchaser could quite easily distinguish the different sources for CONTI and LE CONTÉ. This of course is strongly implied by the lack of any actual confusion in the marketplace during the long period of concurrent sales of the respective products.

The District Court's analysis and approach to the issue of "likelihood of confusion' with reference to reasonable and prudent consumers was proper [App. A]. On the other hand, the Appellate Court's related approaches taken to resolve the issue [App. B and App. D] were seriously incorrect and ought to be overruled by the Supreme Court.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

JOHN E. KELLY,
Counsel for Petitioners.

PASTORIZA & KELLY,
Of Counsel.

APPENDIX A.

District Court, C. D. California.

The J. B. Williams Company, Inc. v. Le Conté Cosmetics, Inc., et al. No. 72-1026-IH Decided May 17, 1973.

TRADEMARKS

1. Identity and similarity—Words—Not similar (§ 67.4111)

As applied to toiletries, "Le Conté" does not so resemble "Conti" that confusion is likely.

Action by The J. B. Williams Company, Inc., against Le Conté Cosmetics, Inc., and Elton C. Toland for trademark infringement and unfair competition. Judgment for defendants.

Nilsson, Robbins & Wills and Charles E. Wills, both of Los Angeles, Calif., and Mason, Fenwick & Lawrence and Edward G. Fenwick, Jr., both of Washington, D. C., for plaintiff.

Pastoriza & Kelly and John E. Kelly, both of Santa Monica, Calif., and Joseph H. Miller, Jr., Beverly Hills, Calif., for defendants.

Hill, District Judge.

There were originally noticed for hearing on March 26, 1973, reciprocal motions of the parties for partial summary judgment. Present on that date were: Charles E. Wills, Esq., of Nilsson, Robbins & Wills, and Edward G. Fenwick, Jr., Esq., of Mason, Fenwick & Lawrence, for Plaintiff, and John E. Kelly, Esq., of Pastoriza & Kelly, and Joseph H. Miller, Jr., Esq., for Defendants. On that date, by stipulation of counsel for both sides

made in open Court, the following actions were taken and ordered:

1. Each of the aforesaid motions for summary judgment was withdrawn.

2. Plaintiff dismissed Lenore Toland as a Defendant in the action.

3. Plaintiff dismissed all claims for any type of relief against any Defendant other than a claim for a permanent injunction.

4. Defendants dismissed all affirmative defenses and all counterclaims or cross-complaints for affirmative relief.

5. Counsel for both sides agreed that the case should be tried commencing on Monday, March 26th, and should be tried on the basis of the facts presented to the Court in the affidavits and exhibits accompanying their said motion for summary judgment and on the basis of further facts which were hereupon stipulated to. Pre-trial was waived.

6. The trial was confined to the sole issue of whether there was a reasonable likelihood of confusion as to the source and origin of Defendants' products. If so held, counsel agreed that the Plaintiff would be entitled to a judgment providing for a permanent injunction against Defendants. If held to the contrary, judgment would be entered for Defendants against Plaintiff.

Trial having been had and the Court having considered the evidence introduced therein and having heard argument, makes the following Findings of Fact, Conclusions of Law and Orders:

FINDINGS OF FACT

1. The Plaintiff, The J. B. Williams Company, Inc., is a corporation organized and existing under the laws of the State of New Jersey, with its principal place of business at 757 Fifth Avenue, New York, New York.

2. The Defendant, Le Conté Cosmetics, Inc., is a corporation organized and existing under the laws of the State of California, with its principal place of business at Los Angeles, California, within the Central Judicial District of California, and was incorporated in October or November 1971.

3. The Defendant, Elton C. Toland, is a citizen and resident of the State of California, and prior to the incorporation of Le Conté Cosmetics, Inc., traded under the style Le Conté Cosmetics, with his principal place of business at Los Angeles, California.

4. The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand Dollars ($10,000).

5. The First Claim for Relief is for the infringement of trademarks registered under the Trademark Laws of the United States, §§ 1051, et seq., of Title 15, United States Code. This Court has jurisdiction thereof pursuant to §§ 1331 and 1338(a) of Title 28, United States Code.

6. Second Claim for Relief is for unfair competition. This Court has jurisdiction thereof pursuant to § 1338 (b) of Title 28, United States Code.

7. Plaintiff is the owner of United States Trademark Registration No. 200,914, dated July 14, 1952; United States Trademark Registration No. 276,709, dated Oc-

tober 28, 1930; United States Trademark Registration No. 502,739, dated October 5, 1948; and United States Trademark Registration No. 507,046, dated February 22, 1949. As between the parties hereto, all of the aforementioned registrations include the trademark "Conti", are valid and in full force and effect. On liquid shampoo and concentrated professional shampoo, the trademark "Conti" is shown in script form with the bottom portion of the "C" extending under adjacent letters. The trademark in script form with the bottom portion of the "C" extending under adjacent letters does not appear on any of the trademark registrations.

8. Since about January 1924, Plaintiff and its predecessors in business have continuously used the trademark "Conti" in connection with the advertising and sale of hand soap and shampoo.

9. Special Castile properties, or capacities for being gentle and mild, are stressed in the labeling, packaging and advertising used by Plaintiff in promoting and selling its Conti products. Plaintiff's Conti products are specialty items designed to appeal to and to be used by consumers with a special need or desire for gentle and mild soap or shampoo.

10. In many instances, Plaintiff has displayed the statutory registration notice with its trademark "Conti" as used on hand soap and shampoo, pursuant to § 1111 of Title 15, United States Code. Prior to instituting the present action, Plaintiff notified the Defendants of their alleged trademark infringement and alleged unfair competition consisting of the use of the name and mark "Le Conté".

11. "Conti" hand soap and "Conti" liquid shampoo have been and are presently being sold to many segments of the retail trade throughout the United States, including the State of California, through such retail outlets as grocery stores, discount stores, and large and small drugstores. Some of these retail outlets are located in predominantly Black-American neighborhoods.

12. "Conti" concentrated professional shampoo and "Conti" concentrated shampoo soaplets have been and are presently being sold through manufacturer's representatives throughout the United States, including the State of California, to beauty and barber suppliers, who resell to beauty and barber shops. Some of the aforementioned suppliers and beauty and barber shops are located in predominantly Black-American neighborhoods.

13. From 1959 to date, in excess of One Million Dollars has been expended in the promotion and advertising of the trademark "Conti" in connection with hand soap and shampoo products. This advertising program has covered the entire United States. However, Plaintiff's advertising expenditures have declined from approximately $397,000 in 1959 to $19,000 in 1967 and 1968. The amount spent on advertising in 1969, 1970 and 1971 has been a negligible amount.

14. From 1959 through January 31, 1972, sales of products under the trade name "Conti" have been in excess of $8,948,000 and these sales are continuing throughout the United States and in California. However, sales of "Conti" products have declined from $1,164,000 in 1959 to $387,000 in 1971.

15. Since 1966, Defendant has produced and marketed a line of hair care products under the trademark

of "Le Conté" including shampoo, hair conditioners, a hair growing treatment and hair spray. The only overlap between Plaintiff's and Defendants' line of products is in the area of shampoo.

16. Defendants' Le Conté hair care products feature a hormone composition and are designed to appeal primarily to persons of the Negro race. 97% of the purchasers of Le Conté products are Black.

17. Le Conté Cosmetics Inc. is a Black-owned and Black-operated company that generally concentrates its sales and promotional efforts in areas of high Black population, such as the Watts region of Los Angeles and the Deep South.

18. Defendants' Le Conté hair care products with hormones are specialty items very different in terms of composition, purpose, function and appeal as compared to Plaintiff's specialty Conti items. The respective Conti and Le Conté products are both generally classified as toiletries but are not interchangeable or significantly similar.

19. Defendants' principal trademark, which appears on all packages and virtually all advertising and promotional materials, is constituted by the words, Le Conté, surrounded by a musical clef symbol.

20. The words, Le Conté, were derived in the early part of the year 1966 by combining certain common letters appearing in the full names of Lenore Cooper Toland, Defendant Toland's former wife, and Elton Cohen Toland. Lenore C. Toland, a retired music teacher from the Los Angeles City School System, suggested the musical clef symbol. Defendants did not know of Plaintiff's name, Conti, prior to this lawsuit.

21. Defendants began selling and promoting their cosmetic and toiletry products under the name, Le Conté, in the middle of the year 1966 through house parties, at conventions, and in the local area. The predecessor trade name, Le Conté Cosmetics, was incorporated and converted to Le Conté Cosmetics Inc. in 1971. The Defendants first used their name, Le Conté, as a trademark and trade name long after the first use by Plaintiff of its name, Conti.

22. From the outset, Defendants have actively promoted their Le Conté name and have actively advertised their Le Conté name and hormone products in newspapers, magazines, trade journals, radio and television.

23. Defendants' advertised expenditures for Le Conté products have been $7,000 in 1969, $17,000 in 1970, and $26,000 in 1971.

24. Defendants' sales for Le Conté products were approximately $1,000 in 1966, $7,000 in 1967, $13,000 in 1968, $46,000 in 1969, over $100,000 in 1970, and for the period of January 1971 through September 1972 were $600,000.

25. Defendants' sales of Le Conté products have been steadily increasing and Plaintiff's sales of Conti products have been steadily declining, now leveling off. At the present time, Defendants' sales of Le Conté toiletries exceeds Plaintiff's sales of Conti toiletries.

26. No evidence of confusion among consumers or tradespeople, known by or reported to Plaintiff or Defendants, has been produced. No evidence of lost business, lost customers, misdirected mail or packages sent to the wrong manufacturer, has been produced.

27. Among reasonable and prudent customers, there is no likelihood of confusion as to the true source of Le Conté toiletries and the true source of Conti toiletries. Reasonable customers would not be deceived or misled into thinking that Le Conté is sponsored by or produced by Plaintiff. Reasonable customers would not be deceived or misled into thinking that Conti is sponsored by or produced by Defendants.

(A) The names employed by Plaintiff and Defendant are substantially different. Plaintiff's name is a single word, "Conti", which would appear to be Italian in origin or derivation. It has no clear meaning in English. There is no evidence before the Court as to how either name is normally pronounced or how it is pronounced by the majority of customers, or drugstore sales clerks, or even by the parties themselves. Plaintiff's name would normally be pronounced by an American with the accent on the first syllable. The "i" would be pronounced as the "y" is pronounced in "ready".

(B) Defendnts' name consists of two words, "Le Conté". It also has no clear meaning in English. The name appears to have a French origin or derivation. The "accent aigu" over the final "e" is distinctively French. It would normally be pronounced by an American in the French manner with the accent on the final syllable. The final "e" would be pronounced like "ay" in "say". The American public would be conditioned to so pronounce it as a result of the millions of dollars spent for television advertising by other manufacturers of cosmetic and grooming products, in which the "accent aigu" over the final "e" is similarly pronounced, e.g. Fabergé and Jean Naté. The Court

takes judicial notice of such pronunciations and the immense funds spent in advertising such products on television.

(C) There is no noticeable visual similarity between the packages of the two parties or between the way the two names are rendered on the packages and in the parties' advertising. Plaintiff's packages are all distinctively green and white. The Conti name on the packages and in advertising is unenclosed by any distinguishing figure. The Conti name is boldly rendered so as to be visible from a great distance. Defendants' packages are all pink and gold. The Le Conté name on the packages is invariably enclosed in a figure like a musical clef. The name on the package is always rendered in pink. The Le Conté name is difficult to read on all its packages and cannot be read from a distance of more than two feet from the eye on most of the packages, e.g. Exhibits A, B and J. The only visual similarity between the two names (other than the fact that they both contain the letters "C-O-N-T") is in the use of a large script "C", the bottom line of which extends underneath some or all of the letters which follow. This type of script "C" appears on all of Defendants' packages and has from the beginning of its use of the Le Conté name. Plaintiff has presented no evidence as to when its script "C" was first adopted by it. Such a "C" does not appear on any of Plaintiff's four trademark registrations. It is as likely as not that Defendant commenced the employment of the script "C" before Plaintiff did. In any event, even when both names are rendered with a script "C", the two names as employed in packaging and advertising have far more, and far more significant, dissimilarities than similarities.

(D) Defendants' product line consists of hair treatment, conditioners, "Growhair" treatment, conditioner rinse and "conditioner shampoo". The only overlap is in shampoo. Plaintiff has four kinds of shampoo, namely professional shampoo, shampoo concentrate, shampoo with olive oil and shampoo soaplets. The parties feature a very different thrust, appeal and motif in their packaging and advertising. Defendants' packages and advertising feature hormone content. Plaintiff's packaging and advertising feature Castile soap with olive oil content. Defendants' advertising and the copy on its containers are directed primarily at Black customers who constitute 97% of its customers. Plaintiff's copy is directed primarily at persons interested in a Castile-based soap and shampoo featuring gentleness. This appeal in Plaintiff's copy is made to persons of all races and directed primarily to no particular race. There is no evidence as to the racial distribution of Plaintiff's customers.

28. Any finding of fact which is held to be a conclusion of law shall be deemed to be a conclusion of law.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the subject matter and jurisdiction over Plaintiff and Defendants. Jurisdiction arises under the Trademark Laws of the United States, 15 U.S.C. § 1051 et seq. and under 28 U.S.C. §§ 1331 and 1338(a). Venue is based on 28 U.S.C. § 1391. Jurisdiction is also based on diversity of citizenship between Plaintiff and the Defendants, the amount in controversy exceeding $10,000, exclusive of interest and costs, under 28 U.S.C. § 1332.

[1] 2. Among reasonable and prudent customers, there is no likelihood of confusion as to the source and/or origin of Le Conté products and the source

and/or origin of Conti products. Reasonable customers would not be confused or deceived or misled into thinking that Le Conté products, or any of them, is sponsored by or produced by Plaintiff. Nor would reasonable customers be confused or deceived or misled into thinking that Conti products, or any of them, is sponsored by or produced by Defendants.

As previously judicially recognized, the purchasers of toiletries and cosmetics "are meticulous and do not depend solely on pronunciation. They rely on the reputation of the makers of the various brands." Lucien Lelong v. Lenel, 181 F.2d 3, 85 USPQ 117 (5th Cir. 1950). See also Jean Patou v. Jacqueline Cochran, 201 F.Supp. 861, 133 USPQ 242 (SD NY, 1962). The Court notes that the respective marks in Lelong, supra, were much more similar in appearance and pronunciation than are Plaintiff's and Defendants' marks in Lelong, the marks in dispute were "Balaiza" and "Bellezza".

Moreover, even if the reasonable and prudent toiletry purchaser is no more careful or meticulous a shopper than the shopper for ordinary, inexpensive household goods, there is, and would be, no likelihood of confusion.

Neither the trademark, name and device, taken alone, nor the total physical image given by Defendants' product and name together—the total impression of package, size, shape, color, design and name—is likely to confuse the ordinary and prudent customer as to the source or origin of the respective products.

3. Any conclusion of law that is held to be a finding of fact is deemed to be a finding of fact.

4. Judgment will be entered in favor of the Defendants and against the Plaintiff. Each side will bear its own costs.

APPENDIX B.

Opinion of the United States Court of Appeals, for the Ninth Circuit.

United States Court of Appeals, for the Ninth Circuit.

The J. B. Williams Company, Inc., *Plaintiff-Appellant,* vs. Le Conté Cosmetics, Inc., and Elton C. Toland and Lenore Toland, *Defendants-Appellees.* No. 73-2470.

OPINION

[June 2, 1975]

Appeal from the United States District Court for the Central District of California

Before: ELY and GOODWIN, Circuit Judges and RENFREW,* District Judge.

RENFREW, District Judge:

On May 10, 1972, plaintiff-appellant filed a complaint in two counts against Le Conté Cosmetics, Elton C. Toland, its principal owner and executive officer, and Lenore Toland, his former wife, for infringement of plaintiff's trademark (15 U.S.C. §1051 *et seq.*) and unfair competition. Defendants filed an answer and counterclaims on July 10, 1972, and plaintiff replied to the counterclaims on July 27, 1972. On September 1, 1972, plaintiff asked for leave to amend its complaint to add a third claim for relief for false representations (15 U.S.C. §1125a). This motion was denied. Defendants and plaintiff then both filed motions for summary judgment with accompanying affidavits. On March 26, 1973, the date set for the oral hearing on these motions, Lenore Toland was dismissed from

*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

the action by plaintiff. Defendants dismissed all of their counterclaims, and the court and parties then agreed to try the case solely on the basis of the affidavits already presented, and certain stipulated facts, on the issue whether there was a "reasonable likelihood of confusing the source and origin of defendants' product with that of plaintiff's". The court found that there was no such likelihood and entered judgment in favor of defendants. For the reasons stated herein, we reverse.[1]

The J. B. Williams Co. has produced hand soaps and shampoos under the trademark "Conti" since 1924. Since 1966 Le Conté Cosmetics has marketed its line of cosmetics and hair care products under the mark "Le Conté". The primary issue on this appeal is whether the trial court correctly determined there was not a likelihood of confusion of "Conti" with "Le Conté". This Court stated in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 152 (9th Cir. 1963):

> "Numerous cases in this and other circuits hold that under the circumstances here present, the question of the likelihood of confusion is one for us to decide. * * *
>
> "One reason * * * is that this determination of likelihood of confusion partakes more of the character of a conclusion of law than of a finding of fact."

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[1]Although the trial court based its judgment on whether there was a "reasonable likelihood of confusion' between the trademarks, the Lanham Act (15 U.S.C. §1051 *et seq.*) requires merely that there be a likelihood of confusion between trademarks to find that there has been trademark infringement. *Fleischmann Distilling Corp. v. Maier Brewing Co., infra,* 314 F.2d at 151. In reversing, we conclude that there was a likelihood of confusion. The reasonableness of the likelihood is not an issue on this appeal.

See also Friend v. H. A. Friend and Co., 416 F.2d 526, 531 (9th Cir. 1969), wherein the court stated: "* * * likelihood of confusion is a matter to be determined by this court [citing *Fleischmann*]".

Whether likelihood of confusion is more a question of law or one of fact depends on the circumstances of each particular case.[2] If the facts are disputed, the findings of the trier of fact must be upheld unless they are clearly erroneous. To the extent that the conclusion of the trial court is based solely upon disputed findings of fact, the appellate court must follow the conclusion of the trial court unless it finds the underlying facts to be without support in the record. Thus, this court has refused to decide *de novo* whether likelihood of confusion has existed, on many occasions. *See HMH Publishing Co., Inc. v. Lambert*, 482 F.2d 595, 598 (9th Cir. 1973); *Carter-Wallace, Inc. v. Procter & Gamble Co.*, 434 F.2d 794, 799 (9th Cir. 1970); *Paul Sachs Originals Co. v. Sachs*, 325 F.2d 212, 214 (9th Cir. 1963); *Plough, Inc. v. Kreis Laboratories*, 314 F.2d 635, 641 (9th Cir. 1963). However, if the facts are not in dispute, the appellate court is "in as good a position as the trial judge to determine the probability of confusion". *Fleischmann Distilling Corp. v. Maier Brewing Co., supra*, 314 F.2d at 152, quoting *Miles Shoes, Inc. v. R. H. Macy & Co., Inc.*, 199 F.2d 602 (2d Cir. 1952).

In the present case, as in *Fleischmann*,[3] no facts presented to the trial court are in dispute. The matter

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[2]*See* 3 Callmann §82.3(b).

[3]In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 196 F.Supp. 401 (N.D.Cal.S.D. 1961), the trial court stated:

> "There is no basic dispute as to the facts, most of which have been admitted in the pleadings, by stipulation, by discovery or by uncontradicted testimony."

was submitted to the court based on cross-motions for summary judgment, and the facts were stipulated. No testimony was taken at trial. Since the same facts, presented in the same manner, are available to us as were available to the trial court, the decision of the trial judge is a conclusion of law, readily reviewable by this court.

This situation is distinguished from those cases, *supra,* in which the trial court's conclusion of whether or not there is a likelihood of confusion is based upon disputed issues of fact, resolved at trial. Each case of trademark infringement must be analyzed based on its own facts. The results reached in different cases decided by this circuit only appear to be contradictory when the particular facts of each case are not analyzed.

Thus, in *Paul Sachs Originals Co. v. Sachs, supra,* it was disputed at trial whether the name "Sachs" had become the dominant portion of appellant's trademark. The trial court found that it had not, and a panel of this court, including two of the judges who had decided *Fleischmann, supra,* the same year, refused to disturb the trial court's finding because it was not clearly erroneous.

The standard followed in this Circuit in reviewing the trial court's decision regarding likelihood of confusion was set out in *Carter-Wallace, Inc. v. Procter & Gamble Co., supra,* 434 F.2d at 799, where the court said:

> "Where there is no dispute as to the facts and the issue of confusing similarity is based solely upon a comparison of the trademarks themselves, this court is in a position equally as good as the trial court to decide the issues. [Citing *Friend v. H. A. Friend and Co., supra,* and *Fleisch-*

> *mann Distilling Corp. v. Maier Brewing Co., supra.*] In the circumstances present here, however, the facts are in dispute, and therefore the district court's determination of lack of confusing similarity as to the source of defendant's SURE deodorant must stand unless clearly erroneous. *Paul Sachs Originals Co. v. Sachs,* 325 F.2d 212, 214 (9th Cir. 1963)."

See also *HMH Publishing Co., Inc. v. Lambert, supra,* 482 F.2d at 599, n. 6.

When, as in the present case, the trial court has based its decision upon stipulated facts, rather than facts resolved at trial, this court can, and should, determine the issue of likelihood of confusion for itself.

In deciding whether there is a likelihood of confusion, an important consideration is whether the trademark seeking protection is "strong" or "weak". A "strong" mark is one which is used only in a "fictitious, arbitrary and fanciful manner", *see National Lead Co. v. Wolfe,* 223 F.2d 195, 199 (9th Cir. 1955), whereas a "weak" mark is a mark that is a meaningful word in common usage, *see Sunbeam Lighting Co. v. Sunbeam Corp.,* 183 F.2d 969, 972-973 (9th Cir. 1950),[4] or is merely a suggestive or descriptive trademark, *see Majestic Mfg. Co. v. Majestic Electric Appliance Co., Inc.,* 127 F.2d 862 (6th Cir. 1949). A "strong" mark is entitled to a greater degree of protection than is a "weak" one because of its unique usage, *see Stork*

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[4]However, this Court does not approve the "probable confusion" standard mentioned in *Sunbeam, supra,* 183 F.2d at 974, insofar as it may differ from the "likelihood of confusion" standard.

Restaurant v. Sahati, 166 F.2d 348, 355 (9th Cir. 1948). "Conti" must be considered a "strong" mark because it was stipulated at trial that the origin of the name is not known, and there was no evidence produced that it is a word with a meaning of its own.

In deciding whether there is a likelihood of confusion between "Conti" and "Le Conté", the marks must be compared for similarity in respect to appearance, sound and meaning. *See National Lead Co. v. Wolfe, supra,* 223 F.2d at 201. Here, neither mark has any clear meaning in English, but their appearances are similar. There is no evidence that most Americans would pronounce "Conti" and "Conté" differently, in spite of the French spelling of the latter word. Adding "Le" does not distinguish the sounds of the two marks significantly. The trial court's finding that Americans would normally pronounce "Le Conté" in the French manner with the accent on the final syllable because of the heavy advertising of such brands as "Fabergé" and "Jean Naté" it without support in the record.

If whether there exists a likelihood of confusion was based on the likelihood that a prudent, worldly person would be confused, then the differences between these two marks might be sufficient. However, as was stated in *Stork Restaurant v. Sahati, supra,* 166 F.2d at 359:

> "The law * * * protects not only the intelligent, the experienced, and the astute. It safeguards from deception also the ignorant, the inexperienced, and the gullible."

It is the latter type of person who would very likely be confused by the similarity of the trademarks. The trial court's conclusion of law that the persons to be considered in determining the issue of likelihood of confusion are "reasonable and prudent" customers is a misstatement of the law in this Circuit and is not the test to be used.

Appellees argue that the products of the two companies are so different that, even if the names are similar, there is no possibility of confusion. While the major components of some of the products of the two companies do differ, both companies produce hair care products whose uses are "related so that they are likely to be connected in the mind of a prospective purchaser", *Fleischmann Distilling Corp. v. Maier Brewing Co., supra,* 314 F.2d at 159, because the products are similar and the markets for the two lines of products overlap. The trial court said in its finding of fact 11 that some of Conti's products are sold in predominantly Black-American neighborhoods where, admittedly, most of Le Conté's products are sold. This fact, plus the similarity of the products, is enough to conclude that there is a likelihood of confusion of the marks.

We hold therefore that the court below was in error in entering judgment for appellees, because a likelihood of confusion has been shown.

A second issue raised on this appeal is whether the trial judge correctly denied appellant leave to

amend its original complaint to include a claim for false representations made by appellees. The original complaint was filed on May 10, 1972. Less than six weeks after appellant claims it became aware of the basis for a third cause of action, it requested leave to amend the complaint.

While the trial judge may exercise his discretion in granting leave to amend pleadings, *Foman v. Davis,* 371 U.S. 178, 182 (1962), Rule 15(a) of the Federal Rules of Civil Procedure provides that "leave [to amend] shall be freely given when justice so requires", and "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U.S. at 182. On remand, therefore, we suggest that the trial court consider granting leave to amend the complaint.

The judgment below is reversed and the cause is remanded to the district court with directions to enter judgment in accordance with this opinion and to determine the relief to which appellant is entitled.

APPENDIX C.

No. 73-2470

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

THE J. B. WILLIAMS COMPANY, INC.,
Plaintiff-Appellant,

vs.

LE CONTÉ COSMETICS, INC., and ELTON C. TOLAND,
Defendants-Appellees (Petitioners).

Appeal From the United States District Court for the Central District of California.

PETITION FOR REHEARING.

Points for Reconsideration.

In requesting the Appellate Court to reconsider and/or grant a rehearing as to portions of its June 2, 1975 opinion under Rule 40 of the Rules of Appellate Procedure—Le Conté Cosmetics[1] invites particular attention to the following points:

1. Through misapprehension of the law in this Circuit an extremely liberal test merely requiring "like-

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[1]For convenience, the Appellees-Defendants Le Conté Cosmetics, Inc., and Elton C. Toland, shall usually be collectively referred to as Le Conté Cosmetics; Appellant-Plaintiff, The J. B. Williams Co., Inc., shall be referred to as J. B. Williams; the 604-page record shall be cited as [R with page no.]; the Court Reporter's Transcript of the March 26-28, 1973 proceedings shall be cited as [Tr. with page no.]; and, the

lihood of confusion among ignorant, inexperienced and gullible purchasers" was followed in reversing the District Court.

2. The correct test in this Circuit as followed by the District Court is "reasonable likelihood of confusion" or "likelihood of confusion among reasonable purchasers".

3. Even if a liberal test is to be the law in this Circuit, the parties openly agreed before trial to be judicially bound only by the "reasonable likelihood of confusion" test—and the procedure of the District Court should not have been disturbed.

4. Through misapprehension of the trial proceedings the Appellate Court believed that all facts at trial were undisputed and stipulated, whereas, much to the contrary, all critical facts were disputed until resolved by the District Court's own fact findings arrived at by drawing inferences.

5. The Appellate Court's trial *de novo* of this controversy was improper since all of the District Court's own fact findings developed by drawing inferences at trial must remain undisturbed unless "clearly erroneous".

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typewritten form of the Appellate Court's Opinion of June 2, 1975 shall be cited as (Opinion with page no. and line nos.).

ARGUMENT.

This Circuit Does Not Follow the Liberal Test of "Likelihood of Confusion Among Ignorant, Inexperienced and Gullible Purchasers" and the Parties Specifically Agreed to Be Bound by a Far Different Test.

The test set forth in *Stork Restaurant v. Sahati,* 166 F.2d 348 (9th Cir. 1948), adopted by the Appellate Court to compare the similarities and dissimilarities between Conti and Le Conté (Opinion, p. 6, lines 1-14) is no longer the law in this Circuit. If the test is allowed to stand, it will radically change the trademark laws.

From our research the extremely liberal test of *Stork Restaurant* [involving identical marks and designs, restaurant services and intent to copy], now 27 years old, has been referred to with apparent approval by this Circuit in only *Fleischmann Distilling Corp. v. Maier Brewing Co.,* 314 F.2d 149 (9th Cir. Feb. 12, 1963) [involving identical marks and alcoholic beverages]. In fact the *Stork Restaurant* decision is based on California law and does not even relate to the Lanham Act which became effective after the complaint was filed.

The liberal test echoed in *Fleischmann* was short-lived, *i.e.*, eight days, as indicated in *Plough Inc. v. Kreis Laboratories,* 314 F.2d 635 (9th Cir. Feb. 20, 1963). Judge Pope, who wrote the *Fleischmann* opinion, vigorously dissented in *Plough* about a week later, attempting to draw attention to both the *Stork Restaurant* and *Fleischmann* decisions and the liberal test. Neither related to cosmetics or toiletries such as Conti and Le Conté.

Since it has not reappeared until the Appellate Court's present opinion (Opinion, p. 6, lines 1-14) it may be implied that the liberal test of "likelihood of confusion among ignorant, inexperienced and gullible purchasers" was plowed under by the *Plough* decision.

Of critical importance is the fact that the parties unequivocally and without hesitation agreed to the test of "reasonable likelihood of confusion as to source and origin" as indicated in the District Court's judgment [R 579]. At trial the following exchange occurred:

> Mr. Wills [J. B. Williams' counsel]: The words of art, your Honor, are "likelihood of confusion".
>
> The Court: Is it "reasonable likelihood"? or straight "likelihood"?
>
> Mr. Wills: "Reasonable likelihood".
>
> The Court: That is what I thought. And you agree with that? Mr. Kelly [Le Conté Cosmetics' counsel]: Yes, indeed, your Honor.

Shortly thereafter related dialogue continued as follows:

> The Court: Now, gentlemen, let me tell you what it looks like to me. The only logical way, it seems to me, that I can decide this issue of reasonable likelihood of confusion is to, in effect, have you stipulate with the Court that that issue can be tried right now so I can make findings of fact on that issue; . . .
>
> Mr. Wills: So stipulated, your Honor.
>
> Mr. Kelly: So stipulated, your Honor.

Even if the Appellate Court continues to believe that the test is "likelihood of confusion among ignorant, inexperienced and gullible purchasers" the parties agreed only to be judicially bound by the "reasonable likelihood

of confusion" test. Unless any such test whether more or less liberal is unconstitutional, unlawful or against public policy, the parties and the District Court should be permitted by the Appellate Court to have proceeded in the prescribed manner.

The Appellate Court's reversal of the District Court's judgment based on a substituted and very liberal test is not just shocking to Le Conté Cosmetics—it has denied Le Conté Cosmetics of its procedural and substantive due process.

While the U.S. Supreme Court has not spoken for nearly a century on the test to be applied in trademark conflict situations, it is of interest that the Supreme Court's celebrated decision of *McLean v. Fleming*, 96 U.S. 245 (1877) is referred to in *Stork Restaurant* but for other reasons. The Supreme Court's *McLean* decision is of particular significance for its general observations as to the test applicable in trademark conflicts, as follows:

> "All that courts of justice can do, in that regard, is to say that no trader can adopt a trademark, so resembling that of another trader, *as that ordinary purchasers, buying with ordinary caution, are likely to be misled*" [96 U.S. 245 at 251] (Emphasis added).
>
> ". . . a court of equity will not interfere, when ordinary attention by the purchaser of the article would enable him at once to discriminate the one from the other. Where the similarity is sufficient to convey a false impression to the public mind, and is of a character to mislead and deceive the ordinary purchaser in the exercise of ordinary care and caution in such matters, it is sufficient

> to give the injured party a right to redress, if he has been guilty of no laches" [96 U.S. 245 at 255].

Surely the ignorant, inexperienced and gullible purchasers referred to in *Stork Restaurant* are not the same as and are probably opposite to the ordinary purchasers buying with ordinary care, attention and caution referred to by the Supreme Court in *McLean.*

If the trademark law requires subsequent trademark users to adopt safeguards to prevent the ignorant, inexperienced and gullible from becoming misled, then such trademark users woud be burdened with the strict liability of insurers. The Supreme Court has indicated that this is not required in *Kellogg Co. v. National Biscuit Co.,* 305 U.S. 111 (1938), as follows:

> "The obligation resting upon Kellogg Co. is not to insure that every purchaser will know it to be the maker but to use every *reasonable means to prevent confusion*" (Emphasis added).

The liberal test followed by the Appellate Court in resolving this controversy is tantamount to equating likelihood of confusion with "possibility of confusion". There is always a "possibility" that an ignorant, unintelligent, gullible or unthinking purchaser may become confused between competing and even non-competing products. But the trademark laws protect the trademark users too, so the mere "possibility" is not sufficient to establish legal confusion. *Carter-Wallace Inc. v. Proctor & Gamble Co.,* 434 F.2d 794, 799 (9th Cir. 1970) [involving cosmetics and toiletries].

The Test in This Circuit Is Clearly Based on "Reasonable Likelihood of Confusion" or "Likelihood of Confusion Among Reasonable Purchasers".

The test announced and relied upon by the Appellate Court (Opinion, p. 6, lines 1-14) in making its Conti vis-a-vis Le Conté comparison, is, with all due respect, a violent departure from the correct test of this Circuit and the test universally followed by all other circuits.

The correct test in deciding trademark conflicts is either "reasonable likelihood of confusion" or "likelihood of confusion among reasonable purchasers". With the notable exceptions of the *Stork Restaurant* and *Fleischmann* decisions this Circuit indeed follows the "reasonable likelihood of confusion" test as was applied by the District Court [R 578] and which was discussed in our Appellees' Brief, pages 28 and 29.

Application of the liberal test by the Appellate Court instead of the correct "reasonable likelihood of confusion" test is of critical importance to Le Conté Cosmetics, since it was the major factor in overturning the District Court's judgment. The Appellate Court commented that if likelihood of confusion is based on a "prudent, worldly person" then the "differences between these two marks might be sufficient" (Opinion, p. 6, lines 2 and 3).

Of even greater overriding concern is the high interest of all manufacturers and trademark owners to know whether their trademark operations in this Circuit are to be governed by the test of "likelihood of confusion among ignorant, inexperienced and gullible purchasers" or "likelihood of confusion among reasonable and prudent purchasers".

Purchasers of cosmetics and toiletries such as Le Conté and Conti are especially careful in distinguishing between competing products so the chances of reasonable likelihood of confusion occurring are even further decreased. See our Appellees' Brief, pages 44-46. This rule has been recently reaffirmed by this Circuit with respect to hair care products in *Redken Laboratories Inc. v. Clairol, Inc.*, 501 F.2d 1403 (9th Cir. 1974) where it was noted that such hair care products are "directed toward individual and discriminating taste", that the consumers "who purchase these products learn of necessity to distinguish between many products designed for application to human hair" and that the "*average, prudent* beautician or consumer would not be likely to become confused" (Emphasis added).

The most recent published trademark decision of this Circuit, *Saxony Products, Inc. v. Guerlain, Inc.*, ... F. 2d ...., 185 U.S.P.Q. 474 (9th Cir. Apr. 1975), prior to the Appellate Court's opinion, and which also pertains to toiletries emphatically stresses the correct test in terms of:

> "Whether there is a '. . . reasonable likelihood that consumers would be confused as to the source . . ." [185 U.S.P.Q. 475 at 479].
>
> "Whether a '. . . reasonable customer could mistake the source . . .' [185 U.S.P.Q. 475 at 480].

The appellate Court in *Saxony Products* agreed with the District Court's finding that "Among reasonable consumers there is no likelihood of confusion as to the true source" of the accused product [185 U.S.P.Q. 475 at 480].

In other decisions of this Circuit relating to toiletries, *Smith v. Chanel Inc.*, 402 F.2d 562 (9th Cir. 1968), the test under the Lanham Act was framed as to:

> ". . . *reasonable* likelihood that purchasers will be confused as to the sole source, identity or sponsorship of the advertiser's product" (Emphasis added).

From our research of the more recent decisions of this Circuit and in particular those dealing intimately with toiletries and cosmetics [which category includes all of the products sold under the Conti and Le Conté marks] there is no doubt but that the only and correct test is "reasonable likelihood of confusion" or alternatively "likelihood of confusion among reasonable purchasers".

Again this test was well understood by the District Court and all the parties including J. B. Williams whose counsel agreed that the issue for trial was "reasonable likelihood of confusion" [Tr. 8, 9].

We respectfully submit that the Appellate Court's observation that "The reasonableness of the likelihood is not an issue on this appeal" (Opinion, p. 2, lines 32 and 33) demonstrates misapprehension of the correct test followed by this Circuit.

But for the misapprehension of the Appellate Court who mistakenly employed the liberal test of "likelihood of confusion among ignorant, unintelligent and gullible purchasers" the District Court's judgment would have been affirmed.

All of the Critical Facts in This Controversy Were Found by the District Court Who Drew Inferences From the Trial Proceedings and Are Entitled to Be Upheld Unless Deemed "Clearly Erroneous" by the Appellate Court.

The Appellate Court has misapprehended the District Court's trial proceedings as to how the fact findings evolved. To explain why a *de novo* trial was proper, the Appellate Court observed that ". . . no facts presented at the trial court are in dispute. The matter was submitted to the Court based on cross motions for summary judgment and the facts were stipulated". This is seriously inaccurate. Only the most basic facts were developed by stipulation.

All of the critical operative facts upon which the District Court's decision turned were found solely by the District Court after considering the Elton C. Toland deposition, numerous affidavits, advertising exemplars, actual products, etc. Particular findings of fact which were found solely by the District Court, either completely or in large measure, were 9, 13, 14, 16, 18, 23, 24, 25, 26, 27, 27A, 27B, 27C and 27D.

Indeed, a great many stipulated facts were rejected and not adopted at all by the District Court (see Appellant's Main Brief, Appendix, pp. 1-25), to the disappointment of both parties.

This mistaken analysis of the facts and trial procedures by the Appellate Court is of vital concern to Le Conté Cosmetics and has cost it a reversal of the District Court's decision relative to its mark

Le Conté which has now been used for over nine years.

Those facts determined by the District Court were entitled to be upheld unless deemed "clearly erroneous" and not supported by the record. No specific fact has been indicated by the Appellate Court to be "clearly erroneous". The Appellate Court has indicated that since the District Court ". . . based its decision upon stipulated facts . . ." that it may ". . . determine the issue of likelihood of confusion for itself" (Opinion, p. 4, lines 29-32). This is just not so and the Appellate Court's trial *de novo* was improper because there were many disputed facts.

The "expedited" trial did not make the District Court's own fact findings more vulnerable so that the "clearly erroneous" requirement could be laid aside. See *Custom Paper Products Co. v. Atlantic Paper Box Co.*, 469 F.2d 178, 179 (1st Cir. 1972)—relying upon *Lundgren v. Freeman*, 307 F.2d 104, 113-114 (9th Cir. 1962).

In a related matter the Appellate Court has not given any reason for disagreeing with the District Court's taking of judicial notice set forth in Finding of Fact 27B except that it ". . . is without support in the record (Opinion, p. 5, line 30). The pronunciation of nationally advertised French brand names for toiletries is well within the fund of general knowledge and need not be "in the record".

Conclusion.

The Appellate Court is hereby asked to grant this petition for a rehearing in order to correct its misapprehensions as to the "reasonable likelihood of confusion" test and the type of fact findings by the District Court.

PASTORIZA & KELLY,
JOHN E. KELLY, Esq.,
Attorneys for Appellees-Petitioners.

I, John E. Kelly, attorney for Appellees-Petitioners, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for purpose of delay.

JOHN E. KELLY,
Attorney for Appellees-Petitioners.

APPENDIX D.

Opinion of the United States Court of Appeals for the Ninth Circuit (Revised September 18, 1975).

United States Court of Appeals, for the Ninth Circuit.

The J. B. Williams Company, Inc., *Plaintiff-Appellant,* vs. Le Conté Cosmetics, Inc., and Elton C. Tolan and Lenore Toland, *Defendants-Appellees.* No. 73-2470

OPINION

[June 2, 1975]

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and RENFREW,* District Judge.

RENFREW, District Judge:

On May 10, 1972, plaintiff-appellant filed a complaint in two counts against Le Conté Cosmetics, Inc., Elton C. Toland, its principal owner and executive officer, and Lenore Toland, his former wife, for infringement of plaintiff's trademark (15 U.S.C. §1051 et seq.) and unfair competition. Defendants filed an answer and counterclaims on July 10, 1972, and plaintiff replied to the counterclaims on July 27, 1972. On September 1, 1972, plaintiff asked for leave to amend its complaint to add a third claim for relief for false representations (15 U.S.C. §1125a). This motion was denied. Defendants and plaintiff then both filed motions for summary judgment with accompanying affidavits. On March 26, 1973, the date set for the oral hearing on these motions, Lenore Toland

*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.

was dismissed from the action by plaintiff. Defendants dismissed all of their counterclaims, and the court and parties then agreed to try the case solely on the basis of the affidavits and exhibits already presented, and certain stipulated facts, on the issue whether there was a "reasonable likelihood of confusing the source and origin of defndants' product with that of plaintiff's".[1] The court found that there was no such likelihood and entered judgment in favor of defendants. For the reasons stated herein, we reverse.

The J. B. Williams Co. has produced hand soaps and shampoos under the trademark "Conti" since 1924. Since 1966 Le Conté Cosmetics has marketed its line of cosmetics and hair care products under the mark "Le Conté". The primary issue on this appeal is whether the trial court correctly determined there was not a likelihood of confusion of "Conti" with "Le Conté". This Court stated in *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 314 F.2d 149, 152 (9th Cir. 1963):

> "Numerous cases in this and other circuits hold that under the circumstances here present, the question of the likelihood of confusion is one for us to decide. In Sleeper Lounge Company v. Bell Manufacturing Co., 9 Cir., 253 F.2d 720, 723, this court quoted with approval the quotation in Miles Shoes, Inc. v. R. H. Macy & Co., 2 Cir., 199 F.2d 602, that 'we are in as good a position as the trial judge to determine the probability of confusion.'

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[1]The Lanham Act (15 U.S.C. §1051 *et seq.*) provides that use without a registrant's consent of "any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or

(This footnote is continued on next page)

> "One reason for applying the rule of that case and of the other cases in accord cited in the margin [footnote deleted] is that this determination of likelihood of confusion partakes more of the character of a conclusion of law than of a finding of fact."

See also *Friend v. H. A. Friend and Co.*, 416 F.2d 526, 531 (9th Cir. 1969), wherein the court stated: "[L]ikelihood of confusion is a matter to be determined by this court [citing *Fleischmann*]".

Whether likelihood of confusion is more a question of law or one of fact depends on the circumstances of each particular case.[2] To the extent that the conclusion of the trial court is based solely upon disputed findings of fact, the appellate court must follow the conclusion of the trial court unless it finds the underlying facts to be clearly erroneous. Thus, this Court has refused on many occasions to decide *de novo* the facts underlying the trial court's determination of whether likelihood of confusion existed. *See Carter-Wallace, Inc. v. Procter & Gamble Co.*, 434 F.2d 794, 799 (9th Cir. 1970); *Paul Sachs Originals Co. v. Sachs*, 325 F.2d 212, 214 (9th Cir. 1963); *Plough, Inc. v. Kreis Laboratories*, 314 F.2d 635, 641 (9th Cir. 1963). However, if the facts are not in dispute, the appellate court is "in as good a position as the trial judge to determine the probability of confusion". *Fleischmann Distilling Corp. v. Maier Brewing Co., supra*, 314 F.2d at 152, quoting *Miles Shoes, Inc. v. R. H. Macy & Co.*, 199 F.2d 602 (2d Cir. 1952).

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advertising of any goods or services on or in connection with which such use is likely to cause confusion" will entitle the registrant to certain remedies. 15 U.S.C. §1114.

[2]*See* 3 R. Callman, *The Law of Unfair Competition Trademarks and Monopolies*, §82.3(b) (3d ed. 1969).

In the present case, as in *Fleischmann*,[3] no facts presented to the trial court are in dispute. The matter was submitted to the court based on affidavits, exhibits, and certain stipulated facts. No testimony was taken at trial. Since no issue of material fact arises from the affidavits, exhibits and stipulated facts, the determination by the trial judge, as to whether in light of those undisputed facts there existed a "likelihood of confusion" between Conti and Le Conté is a question of law readily reviewable by this Court.[4]

This situation is distinguished from those cases, *supra*, in which the trial court's conclusion of whether or not there is a likelihood of confusion is based upon disputed issues of fact, resolved at trial. Each case of trademark infringement must be analyzed based on its own facts. The results reached in different cases decided by this circuit only appear to be contradictory when the particular facts of each case are not analyzed.

Thus, in *Paul Sachs Originals Co. v. Sachs, supra*, it was disputed at trial whether the name "Sachs" had become the dominant portion of appellant's trademark. The trial court found that it had not, and a panel of this court, including two of the judges who had decided *Fleischmann, supra*, the same year, refused to disturb the trial court's finding because it was not clearly erroneous.

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[3]In *Fleischmann Distilling Corp. v. Maier Brewing Co.*, 196 F.Supp. 401 (N.D.Cal. 1961), the trial court stated:

> "There is no basic dispute as to the facts, most of which have been admitted in the pleadings, by stipulations, by discovery or by uncontradicted testimony."

[4]It might be argued that the conflicting contentions of the parties with respect to similarity in sound and appearance of the two marks gives rise to a factual dispute. This argument is no obstacle to the scope of our review since the trial court's determination on those questions was clearly erroneous.

The standard followed in this Circuit in reviewing the trial court's decision regarding likelihood of confusion was set out in *HMH Publishing Co, Inc. v. Lambert*, 482 F.2d 595, 599, n. 6 (9th Cir. 1973):

> "If the facts are not in dispute and the issue of confusing similarity is based solely upon the comparison of the marks in the context of extrinsic facts, the appellate court may determine the issue of confusing similarity."

To this standard, we add a corollary test, namely, where the conclusion of the trial court is based solely upon disputed findings of fact, the appellate court need not follow the conclusion of the trial court where it finds the underlying facts to be clearly erroneous.

When, as in the present case, the trial court has based its decision upon affidavits, exhibits and certain stipulated facts, none of which raises an issue of material fact, this court can, and should, determine the issue of likelihood of confusion for itself.

In order to determine whether there is a likelihood of confusion in a trademark infringement case, the Court must consider numerous factors, including *inter alia* the strength or weakness of the marks, similarity in appearance, sound, and meaning, the class of goods in question, the marketing channels, evidence of actual confusion,[5] and evidence of the intention of defendant in selecting and using the alleged infringing name.[6]

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[5]Although the trial court found no evidence of actual confusion, this fact does not preclude this Court from concluding that there is a "likelihood of confusion", as actual confusion is merely one factor to be considered by the Court when it makes its determination.

[6]With respect to defendant's intent the trial court found that defendants did not know of plaintiff's name "Conti" prior

See Carter-Wallace, Inc. v. Procter & Gamble Co., supra, 434 F.2d at 800; *Paul Sachs Originals Co. v. Sachs, supra,* 325 F.2d at 214. After considering these factors, the Court then must determine whether there exists a likelihood of confusion.

Structuring the analysis in this fashion, it becomes easier to determine whether the trial court findings on the listed factors are ones of law or fact. Characterization is facilitated by an example. Consider the finding in the instant case on similarity of appearance. There was no dispute as to the actual appearance of the marks. With the actual appearance on evidentiary fact, the next step was to decide whether to a reasonable viewer the marks were similar in appearance. That finding, if affirmative, would be aggregated with the other factors and the aggregate assessed as a foundation for the ultimate "likelihood of confusion" determination. Individually each of these findings is preliminary to and not *per se* determinative of the ultimate issue.

Viewing the foundational question as one of "confusing similarity" is improper because it merges analysis of one of the preliminary inquiries with the conceptually distinct step of applying the statutory standard.[7] The marks may be similar in appearance (foundational fact) yet not likely to cause confusion as to their source, particularly when all the factors are considered. Using this approach, similarity of appearance and the remaining factors provide foundational facts and should

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to this lawsuit and that the mark "Le Conte" was derived by combining letters found in the names of defendant Toland and his wife. The Court need not decide whether these findings of the trial court are clearly erroneous, for even if the Court assumes that they are correct, the other factors discussed below require us to conclude that there is a "likelihood of confusion".

[7]"Confusing similarity" is another way of stating the "likelihood of confusion".

be assessed on review under the clearly erroneous rule.

The first step in the analysis is to determine whether the mark seeking protection is "strong" or "weak". A "strong" mark is one which is used only in a "fictitious, arbitrary and fanciful manner", *see National Lead Co. v. Wolfe,* 223 F.2d 195, 199 (9th Cir. 1955), whereas a "weak" mark is a mark that is a meaningful word in common usage, *see Sunbeam Lighting Co. v. Sunbeam Corp.,* 183 F.2d 969, 972-973 (9th Cir. 1950),[8] or is merely a suggestive or descriptive trademark, *see Majestic Mfg. Co. v. Majestic Electric Appliance Co., Inc.,* 127 F.2d 862 (6th Cir. 1949). A "strong" mark is entitled to a greater degree of protection than is a "weak" one because of its unique usage, *see Stork Restaurant v. Sahati,* 166 F.2d 348, 355 (9th Cir. 1948). "Conti" must be considered a "strong" mark because it was stipulated at trial that the origin of the name is not known, and there was no evidence produced that it is a word with a meaning of its own.

Second, the marks must be compared for similarity in appearance, sound, and meaning. *See National Lead Co. v. Wolfe, supra,* 223 F.2d at 201. Here, neither mark has any clear meaning in English, but their appearances are similar. We reject the contrary finding of the trial court as clearly erroneous. Further, the trial court found, on the basis of judicial notice, that Americans would normally pronounce "Le Conté" in the French manner with the accent on the final syllable

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[8]However, this Court does not approve the "probable confusion" standard mentioned in *Sunbeam, supra,* 183 F.2d at 974, insofar as it may differ from the "likelihood of confusion" standard.

because of the heavy advertising of such brands as "Fabergé" and "Jean Naté". That finding is not a proper subject for judicial notice.

Finally, the Court must consider the similarity in use of the products of both companies and the channels through which they are marketed. Appellees argue that the products of the two companies are so different that, even if the names are similar, there is no possibility of confusion. While the major components of some of the products of the two companies do differ, both companies produce hair care products whose uses are "related so that they are likely to be connected in the mind of a prospective purchaser", *Fleischmann Distilling Corp. v. Maier Brewing Co., supra,* 314 F.2d at 159, because the products are similar and the markets for the two lines of products overlap. The trial court said in its Finding of Fact 11 that some of Conti's products are sold in predominantly Black-American neighborhoods where, admittedly, most of Le Conté's products are sold. This fact joins findings of similarity in the products and in the sound and appearance of the two marks plus a designation of the Conti mark as "strong". It may be that a worldly and sophisticated person would be able to discern the differences between the marks. We conclude, however, that a reasonable customer of average intelligence and experience would very likely be confused as to the source, due to the nexus of features shared by the two marks.

We hold therefore that the court below was in error in entering judgment for appellees, because a likelihood of confusion has been shown.

A second issue raised on this appeal is whether the trial judge correctly denied appellant leave to amend

its original complaint to include a claim for false representations made by appellees. The original complaint was filed on May 10, 1972. Less than six weeks after appellant claims it became aware of the basis for a third cause of action, it requested leave to amend the complaint.

While the trial judge may exercise his discretion in granting leave to amend pleadings, *Foman v. Davis,* 371 U.S. 178, 182 (1962), Rule 15(a) of the Federal Rules of Civil Procedure provides that "leave [to amend] shall be freely given when justice so requires", and "outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules." 371 U.S. at 182. On remand, therefore, we suggest that the trial court consider granting leave to amend the complaint.

The judgment below is reversed, and the cause is remanded to the district court with directions to enter judgment in accordance with this opinion and to determine the relief to which appellant is entitled.

APPENDIX E.

Order.

United States Court of Appeals, for the Ninth Circuit.

The J. B. Williams Company, Inc., Plaintiff-Appellant, vs. Le Conte Cosmetics, Inc., and Elton C. Tolan and Lenore Toland, Defendants-Appellees. No. 73-2470

Appeal from the United States District Court for the Central District of California.

Before: ELY and GOODWIN, Circuit Judges, and RENFREW,* District Judge

The panel as constituted in the above case has voted to deny appellees' petition for rehearing.

The petition for rehearing is denied and the opinion filed herein on June 2, 1975, is revised in the form filed this same date.

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*The Honorable Charles B. Renfrew, United States District Judge, Northern District of California, sitting by designation.